Industrial Court of New South Wales

CITATION:	**Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades) (No 2) [2007] NSWIRComm 168**
PARTIES:	PROSECUTOR Inspector Rosalie Mayo-Ramsay DEFENDANT The Crown in the Right of the State of New South Wales (New South Wales Fire Brigades)
FILE NUMBER(S):	IRC 768 and 769 of 2005
CORAM:	Boland J
CATCHWORDS:	Occupational health and safety - Prosecution of Crown for breaches of Occupational Health and Safety Act 1983 - Fire and explosion in silo - fatalities - Fire brigades - Sentencing considerations - Penalties imposed
LEGISLATION CITED:	Crimes (Sentencing Procedure) Act 1999 Fire Brigades Act 1989 s 78 Occupational Health and Safety Act 1983 s 15(1), s 16(1) Occupational Health and Safety Act 2000 s 121, s 121(3)
CASES CITED:	Capral Aluminium Limited v WorkCover Authority of New South Wales (Inspector Mayo-Ramsay) (2000) 99 IR 29 Crown in Right of the State of New South Wales (Department of Education and Training) v Keenan (2001) 105 IR 181

Fletcher Construction Australia Limited v WorkCover Authority of New South Wales (Inspector Fisher) (1999) 91 IR 66
Inspector Dennis Howard v Multiplex Constructions (NSW) Pty Ltd [2002] NSWIRComm 229
Inspector Jennifer Short v The Crown in the Right of the State of New South Wales (NSW Police) [2007] NSWIRComm 138
Inspector Legge v Intercast & Forge Pty Limited [2006] NSWIRComm 182
Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades) [2006] NSWIRComm 356
Inspector Mayo-Ramsay v Caines Pty Limited & Ors [2006] NSWIRComm 223
Inspector Steven Jones v Walker Group Constructions Pty Ltd [2006] NSWIRComm 11
Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch'ng) (1999) 90 IR 464
Manpac Industries Pty Ltd (formerly t/a Pacific Concrete & Quarries Pty Ltd) v WorkCover Authority of New South Wales (Inspector Glass) (2001) 106 IR 435
Markarian v R (2005) 215 ALR 213
Morrison v Powercoal Pty Ltd (No 3) (2005) 147 IR 117
Newcastle Wallsend Coal Company Pty Ltd v WorkCover Authority (NSW) (Inspector McMartin) (2006) 159 IR 121
R v Thompson; R v Houlton (2000) 49 NSWLR 383
R v Way (2004) 60 NSWLR 168
Regina v Dib [2003] NSWCCA 117
The Crown in Right of State of New South Wales (Department of Education and Training) v O'Sullivan (2005) 143 IR 57
Warman International Limited v WorkCover Authority of New South Wales (1998) 80 IR 326
WorkCover Authority of New South Wales (Inspector Ankucic) v Crown in the Right of the State of New South Wales (Department of Education and Training) (2001) 112 IR 1
WorkCover Authority of New South Wales (Inspector Benbow) v Converquip Pty Limited (2001) 106 IR 258
WorkCover Authority of New South Wales (Inspector

	Keelty) v Crown in Right of the State of New South Wales (Police Service of New South Wales) (No 3) (2002) 112 IR 141 WorkCover Authority of New South Wales (Inspector Martin) v Byrne Civil Engineering Constructions Pty Limited (No 2) (2001) 109 IR 347 WorkCover Authority of New South Wales (Inspector Page) v Walco Hoist Rentals Pty Limited and Another (No 2) (2000) 99 IR 163 WorkCover Authority of New South Wales (Inspector Tuckley) v The Crown in Right of the State of New South Wales (Department of Community Services) (1999) 96 IR 1
HEARING DATES:	25 June 2007
DATE OF JUDGMENT:	4 July 2007
LEGAL REPRESENTATIVES:	PROSECUTOR Mr S Crawshaw SC with Mr M Cahill and Mr A Naylor of counsel Solicitor: Mr G Diggins WorkCover Authority of NSW
	DEFENDANT Mr P M Kite SC with Mr C Lonergan of counsel Solicitor: Mr I V Knight Crown Solicitors Office

---

JUDGMENT:

INDUSTRIAL COURT OF NEW SOUTH WALES

CORAM: BOLAND J

Wednesday 4 July 2007

Matter No IRC 768 of 2005

Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades) (No 2)

Prosecution under s 15(1) of the Occupational Health and Safety Act 1983

Matter No IRC 769 of 2005

Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades) (No 2)

Prosecution under s 16(1) of the Occupational Health and Safety Act 1983

JUDGMENT

[2007] NSWIRComm 168

1 Caines Pty Limited, at Gardiners Road, Rutherford, operated an oilseed crushing plant that extracted oil from a range of oilseeds, including cotton seed, sunflower seed and canola seed. On 6 December 1999 a fire and explosion occurred in a seed meal storage bin, known as bin D. As a consequence, three employees of Caines (Robert Anderson, Ronald Brooker and Geoffrey Terry) received fatal burn injuries.
2 The New South Wales Fire Brigade, represented by the Telarah Fire Brigade and the Hazmat Unit from Newcastle, was in attendance at the premises at the time of the fire and explosion. Ronald Jenkins, the Captain in charge of the Telarah Brigade, received burn injuries to his face and hands.
3 Caines and two of its directors were prosecuted for breaches of the *Occupational Health and Safety Act* 1983 and penalties were imposed: see *Inspector Mayo-Ramsay v Caines Pty Limited & Ors* [2006] NSWIRComm 223. The Crown in the Right of the State of New South Wales, in its capacity as the New South Wales Fire Brigades ("the defendant"), was also prosecuted for breaches of s 15(1) and s 16(1) of the Act.
4 The defendant claimed immunity from prosecution under s 78 of the *Fire Brigades Act* 1989. In *Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades)* [2006] NSWIRComm 356 ('*WorkCover v Fire Brigades*') the Court held there was no immunity and the defendant was found guilty of the two offences. This decision deals with penalty.
5 It is appropriate to identify the personnel involved. There were a number of employees of Caines present at the time of the incident, including the three men who suffered fatal injuries. They were Mr Robert Anderson, Mr Ronald Keith Brooker, Mr Geoffrey Robert Terry, Mr Robert Jordan, Mr Jason Brooker, Mr Jason McKewen,

Mr Richard Zambrowski, Mr Nigel Little, Mr Steven Hipwell and Mr Mark Price. The members of the Telarah Fire Brigade present were Captain Jenkins, Deputy Captain Neil Morriss, Retained Firefighter Michael Pilton, Retained Firefighter David Pilton, Retained Firefighter Darren Schofield, Retained Firefighter Walter Morris, Retained Firefighter Ronald Jarrett and Retained Firefighter Gary Armstrong. The members of the Newcastle Hazmat Unit attending the incident were Station Officer Gary Evans, Firefighter McCall and Firefighter Bear.

6 The events leading to the fire and explosion were described in *WorkCover v Fire Brigades* at [18]-[42]. In order to place the sentencing issues in context par [36] bears repeating:

> 36 The following submission by the prosecutor, summarising the evidentiary material, identifies the location and activities of various personnel and refers to observations made by some of those personnel prior to and at the time of the explosion. Parts of the submission were put squarely in issue by the defendant but for the reasons I will later explain, mostly I have accepted the prosecutor's version of events as accurate and in accordance with the evidence. References to the evidence have been omitted:
>
> > Jason McKewen drove the truck and Robert Jordan operated the auger system used to empty the meal from Bin D. Neither Mr McKewen nor Mr Jordan were provided with any form of personal protective equipment. Mr Jordan was not offered any breathing apparatus.
> >
> > Captain Jenkins directed 4 retained firefighters to form 2 BA [Breathing Apparatus] crews to man a charged hose in the receival bay. One member of each crew was directed by Captain Jenkins to station himself at the top of a ladder located next to the truck in the receival bay with a charged hose for the purpose of extinguishing any burning material augured (sic) from Bin D, via the crushing plant’s transportation system, into the back of the truck. The other member of each crew was directed to man the ladder. The members of these crews, RF Michael Pilton, RF Schofield, Deputy Captain Morriss and RF Armstrong, were wearing their full turn out uniform and fitted with SCBA (Self-Contained Breathing Apparatus). The first shift was taken by RF Schofield and RF Pilton while Deputy Captain Morriss and RF Armstrong stood by. Deputy Captain Morriss and RF Armstrong

relieved RF Schofield and RF Pilton after the low air warning sounded on RF Schofield's breathing apparatus. RF David Pilton assisted his brother, RF Michael Pilton, and RF Schofield, Armstrong and Deputy Capitan Morriss, to don breathing apparatus. With Deputy Captain Morriss' permission, he then left the site to go to his ordinary job as a mechanic. RF David Pilton left the Caines site at approximately 5am. It is likely that RF David Pilton was with or near RF Jarrett in the vicinity of the Telarah Pumper at the time of and in the period leading up to the explosion.

RF Walter Morris acted as the breathing apparatus controller. He monitored the breathing apparatus crews including the time they spent in the apparatus. At the time of the explosion, RF Walter Morris was standing immediately adjacent to the Telarah pumper. It is likely that RF Walter Morris was in and around the receival bay area or the Telarah pumper in the period while Bin D was being augured (sic).

RF Jarrett stayed with the Telarah Pumper during the entire period from his arrival at the site with other members of the Telarah Fire Brigade until the time of the explosion. He assisted other members of the Telarah Fire Brigade to don breathing apparatus.

As the meal was being augered from Bin D through the auger system and into the truck in the receival bay, FF McCall monitored the temperature of the meal as it came out of the chute in the receival bay. He was about 10-15 metres away from the chute at this time. He also monitored the temperature outside Bin D. FF McCall was assisted by FF Bear.

Estimates of the time when augering of the meal from Bin D commenced vary from 5.15am to 5.40am. One to 1½ truckloads of meal had been removed when the auger began to run dry. Members of the Caines staff, in particular, Jason Brooker, Robert Jordan and Bob Anderson, then

bashed on the side of the bin with a 1½-inch (35mm) diameter iron bar to loosen the remaining meal. When this occurred, Mr Jordan noticed "*a lot of pale blue smoke coming out of the doors that feed into the auger*".

After the hose crews rotated, Deputy Captain Morriss was manning the charged hose at the top of the ladder adjacent to the truck. During this period, Deputy Captain Morriss observed:

(a) fine dust in the air in the receival bay, particularly around the chute from which the cottonseed meal was being discharged into the back of the truck;

(b) meal containing chunks of black material and small amounts of burning product being discharged into the back of the truck; and

(c) smoke emanating from the seed receiving pit located under the truck.

Mr Jordan was asked by Mr Anderson to go to the top of the bins on a second occasion that morning. The purpose of this second trip was to measure how much meal was left in Bin D. Again, Mr Jordan made this trip to the top of the bins unaccompanied and unsupervised by any member of New South Wales Fire Brigades.

When Mr Jordan reached the top of the bins he noticed smoke coming out of the inspection hatch at the top of Bin D. When Mr Jordan opened the lid on the inspection hatch to drop the measuring tape into the bin, Mr Jordan saw smoke being drawn back into the bin. Mr Jordan then waited a few minutes before putting his tape about 12 metres down into the bin to a point just above the auger.

When Mr Jordan returned to the base of the bin area, he informed Bob Anderson that the bin was empty. Mr Jordan did not inform anyone of the smoke coming from the inspection port.

The significance of the smoke being drawn back into the bin through the inspection funnel, whilst not apparent to Mr Jordan, must not be underestimated.

Further, it must be observed that, if Mr Jordan been accompanied at all relevant times by a member of the Fire Brigades, a member of the Fire Brigades would have been present to make the subject observation.

Mr Jordan then returned to the operation control panel in the “receival bay”.

Then, in accordance with instructions provided to him by Mr Anderson, Mr Jordan closed all the auger doors to the auger on the hot side of Bin D except for one in which he had changed the air line around for it to remain open as it had a faulty solenoid. Mr Jordan then opened the two rear doors on the auger for the cool side of Bin D. The purpose of this activity was to bring the meal away from the inspection hatch at the base of Bin D.

Mr Anderson also instructed Ron Brooker and Geoffrey Terry to take the inspection hatch cover plate off from the base of Bin D. A member of staff then turned on the compressor so that Mr Brooker and Mr Terry could use a pneumatic bolt gun to undo the bolts securing the inspection hatch cover from the base of Bin D.

Shortly after Mr Jordan started the auger to remove the meal from the cool side of Bin D, Mr Anderson, Mr Brooker and Mr Terry started to remove the inspection hatch cover from the base of Bin D. Richard Zambrowski saw the rattle gun being used to remove the bolts.
As the inspection hatch opened, there was an influx of cold, oxygenated air into Bin D. This influx of air was followed by an explosion inside Bin D and a fireball that emanated from the hatch opening to engulf all three men. As a consequence, all three men suffered serious

burns to more than 60% of their bodies and later died of their injuries.

Mr Jordan was standing at the control panel in the receival bay when the explosion occurred and Mr McEwen was driving the truck. Mr Jordan saw a fireball come out of the augers and engulf the entire loading bay area. Fire also emerged from the discharge chute above the truck in the loading bay.

At the time of the explosion, Captain Jenkins was approaching the base of Bin D. Captain Jenkins saw a fireball coming out of the base of Bin D. Captain Jenkins, who had removed his gloves, pulled down the visor on his helmet to protect his face but suffered severe burns to his hands and other parts of his body.

At the time of the explosion, FF Bear was replacing some equipment into the breathing apparatus vehicle. This vehicle was situated approximately 100m away from the crushing mill. FF Bear hear a loud explosion and, upon investigation, saw a man whose clothing was alight and went to his assistance.

At the time of the explosion, FF McCall was getting a drink out of the BA Van. According to FF McCall, two minutes earlier he had been taking temperature reading near an air inlet valve at Bin D approximately 2.5 metres above ground level.

According to SO Evans, immediately prior to the explosion, he was talking to Captain Jenkins. Captain Jenkins then followed the manager (Mr Anderson) towards the bins. It is not clear from the evidence where SO Evans was situated at the time of the explosion.

During the course of the morning after the arrival of the Hazmat Unit but prior to the explosion, Jason Brooker, Jason McKewen, Richard Zambrowski, Nigel Little, Steven Hipwell and Mark Price, at various times, all

> entered the seed crushing mill and the storage bin area unaccompanied and unsupervised by members of New South Wales Fire Brigades. These Caines' employees were also allowed to undertake activities in and about the seed crushing mill and the storage bin area independent of New South Wales Fire Brigades. These activities included banging on the side of Bin D with a metal bar or "*stock*" whilst the bin was being emptied and also the activation of plant and equipment.
>
> At the time of the explosion, Mr Little and Mr Richard Zambrowski were inside the crushing mill adjacent to the base of bin D. Albeit that these men were some 4 to 5 metres from the base of bin D at the time of the explosion, they were separated from the area in which Mr Anderson, Mr Brooker and Mr Terry were working by the single skin Colorbond sheet wall that was damaged in the explosion.

7 Whilst the defendant relied on s 78 of the *Fire Brigades Act* to claim immunity from prosecution, it conceded that if it were unsuccessful in that regard it would be found guilty of the two offences, subject to particulars of the charges that were not pressed and subject to challenges it made to a number of the particulars that the prosecutor had pressed.

8 In *WorkCover v Fire Brigades* the Court gave consideration to the challenged particulars. Consequently, a number of the particulars of the s 15(1) charge were struck out either because the prosecutor did not press them or because the Court found they had not been made out. It may be noted the amendments to the particulars did not lessen to any significant degree the seriousness of the defendant's failures to ensure safety. The defendant accepted that its failures were serious.

9 The amended particulars of the s 15(1) charge were that the defendant:

> i. Failed to provide or maintain a system of work that was safe and without risks to its employees with respect to the prevention and/or the fighting of fires in seed oil extraction plants, including but not limited to the prevention and/ or fighting of fires in seed meal storage facilities such as the seed meal storage bin, known as bin D, that was located at the incident site.
>
> ii. Failed to provide and/ or maintain a safe work method for use in the fighting of and/or extinguishing a suspected fire in a seed meal storage bin, including but not limited to the cottonseed meal stored in bin D at the subject premises.

iii. Failed to provide and/ or maintain a safe work method for the conduct of monitoring for flammable gases in and about the seed-crushing mill, including but not limited to the vicinity of bin D.

iv. Failed to provide its employees with ~~any or~~ any adequate information about the fire and/ or explosion risks inherent in the processes conducted in and about seed oil extraction plants.

v. ~~Failed to provide information to its employees regarding the risk of spontaneous combustion in stored seed meal, including cottonseed meal~~.

vi. Failed to provide its employees with information regarding the fire and/ or explosion risks associated with the heating and/ or partial combustion of seed meal.

vii. Failed to provide its employees with information regarding the chemical characteristics of substances associated with seed crushing plants and, in particular, the capacity of seed cake and seed meal to ~~spontaneously combust,~~ smoulder and give off pyrolytic vapours and gases.

viii. Failed to provide its employees with information regarding the chemical characteristics of substances associated with seed crushing plants and, in particular, the capacity of seed cake and seed meal to give off pyrolytic vapours and gases when subjected to heating.

ix. ~~Failed to provide its employees with adequate information, instruction and training with respect to the use of the "Dangerous Goods - Initial Emergency Response Guide" book~~.

x. Failed to provide its employees with adequate information, instruction and training with respect to the identification of dangerous goods.

xi. Failed to provide such supervision of the incident site as was necessary to ensure the health and safety at work of its employees whilst undertaking fire-fighting activities at the subject site.

10 As a result of the abovementioned failures, it was held that Captain Jenkins, Deputy Captain Neil Morriss, Retained Firefighter Michael Pilton, ~~Retained Firefighter David Pilton~~, Retained Firefighter Darren Schofield, Retained Firefighter Walter Morris, ~~Retained Firefighter Ronald Jarrett~~, Retained Firefighter Gary

Armstrong, Station Officer Gary Evans, Firefighter McCall and Firefighter Bear were placed at risk of injury.

11 In relation to the charge under s 16(1), it was alleged in the application for order that the defendant had:

> i. Failed to provide or maintain a system of work that was safe and without risks to health and safety of persons not in its employ with respect to the prevention and/ or the fighting of fires in seed oil extraction plants, including but not limited to the prevention and/ or fighting of fires in seed meal storage facilities such as the seed meal storage bin, known as bin D, that was located at the site.
>
> ii. Failed to provide and/or maintain a safe work method statement for the utilisation of non-New South Wales Fire Brigades personnel in fire prevention and/ or fire suppression activities.
>
> iii. Failed to maintain strict control of the site and to control the access of non-New South Wales personnel to areas that were liable to be and were affected by explosion and fire emanating from the storage bin known as bin D.
>
> iv. Failed to provide any or any adequate supervision of non-New South Wales Fire Brigades personnel, namely members of the staff of Caines Pty Ltd, who were present on the site on the morning of 6 December 1999.
>
> v. Allowed non-New South Wales Fire Brigades personnel, namely members of the staff of Caines Pty Ltd to enter areas of the crushing mill and its surrounds whilst unaccompanied and unsupervised by appropriately trained members of the New South Wales Fire Brigades.
>
> vi. Allowed non-New South Wales Fire Brigades personnel, namely members of the staff of Caines Pty Ltd, to act independently of the fire prevention and/or fire suppression activities that were being conducted at the site by members of the New South Wales Fire Brigades.
>
> vii. Failed to ensure that non-New South Wales Fire Brigades personnel were fitted with proper personal protective equipment prior to being permitted access to areas of the site in which they were exposed to risks of injury from the fire located inside bin D.

12 It was further alleged that as a result of the abovementioned failures, Mr Robert

Anderson, Mr Ronald Keith Brooker, Mr Geoffrey Robert Terry, Mr Robert Jordan, Mr Jason Brooker, Mr Jason McKewen, Mr Richard Zambrowski, Mr Nigel Little, Mr Steven Hipwell and Mr Mark Price were exposed to risks to their health and safety arising from the defendant's fire prevention and/or suppression activities at the site. There were no amendments to the particulars of the s 16(1) charge and the offence, as charged, was held to have been made out.

Evidence

13 The evidence in the sentencing proceedings consisted of an extensive affidavit of Mr John Benson, Deputy Commissioner of the New South Wales Fire Brigades ('NSWFB'). Exhibited to his affidavit were the following documents:

· NSWFB Annual Report 1999/2000
· NSWFB Corporate Plan 2000-2003
· NSWFB Corporate Plan 2005-2008
· Occupational Health and Safety – Standing Orders 1999
· Incident Control System SOG 1.1 *Incident Control System*
· Incident Control System SOG 1.2 *Incident Controller*
· Incident Control System SOG 1.6 *Safety Officer*
· Communication SOG 2.3 *Alarm Response Protocols*
· *Dynamic Risk Assessment for Operations: The Safe Person Concept*
· Safety bulletin: 2006/18 *Safety at Natural Gas Incidents*
· Safety bulletin: 2005/01 *Use of intrinsically safe equipment at incidents*
· Safety bulletin: 2005/03 *Hazardous Materials - Void Dusts*
· Operational bulletin: 2007 *SCBA procedures, checks and skills maintenance*
· Operational bulletin: 2006 *Orion four-head gas detector*
· Operational bulletin: 2006 *Fires or overheating conditions involving Oil Seed Products*
· Terms of reference, Occupational Health and Safety Steering Committee
· NSWFB Annual Report 2005/2006
· NSWFB Risk Management Policy 2004
· Report dated 21 August 2006 regarding implementation of recommendations by Senior Deputy State Coroner Jacqueline Milledge, with annexures
· Letter dated 23 December 2003 from Acting Commissioner John Anderson to Deputy State Coroner Jacqueline Milledge
· *Silo Assessment Hazmat Team Technical Debrief*: Cootamundra Silo Fire, January 12-19, 2007.

14 Additionally, the Court was provided with a folder containing the "Recommendations of Coroner [Jacqueline Milledge] in relation to the Incident at Caines Industries Rutherford, of 6 December 1999" and the actions taken by the defendant in compliance with the Recommendations. The folder also contained additional measures taken by the defendant relating to, but extending beyond, the Coroner's Recommendations.

15 Mr Benson is responsible for leading the development of strategic direction, planning and delivery of frontline emergency, disaster response and recovery services in the operational areas of fire suppression, hazardous materials response, non-fire rescue, natural hazards response, emergency medical support to Ambulance Services,

terrorist attack consequence management, aviation and counter disaster and emergency management for the Fire Brigades to ensure the delivery of appropriate emergency service and disaster response and minimise the loss of life and property.

16 The Deputy Commissioner provided an overview of the Fire Brigades noting that it is the largest urban fire service in Australia with a network of over 330 Fire Stations providing protection services to this State's population from fire and hazmat emergencies. In the year ended 30 June 2006, the Fire Brigades responded to over 134,000 emergency calls within the major metropolitan areas, regional centres and towns in country New South Wales together with undertaking rescue responsibilities as well as dealing with the management of hazardous material incidents within the State.

17 Mr Benson described the organisation's corporate executive structure from 1999 and 2003 and its various methods of internal communications. In respect of occupational health and safety Mr Benson noted that prior to the commencement of these proceedings the Fire Brigades had no record of any prosecution action being commenced against it as a corporate entity at any stage in its history – that is to say since 1884 – for any breach of occupational health and safety legislation or its equivalent under previous legislation. He went on to describe the organisation's policies and systems relating to occupational health and safety up to 1999 and the improvements made since that time. He said the Corporate Executive Group had identified as one of its priorities for the next three year period up to and including 2008 that of ensuring its entire workforce and, in particular, all operational firefighters, were able to provide to the community of New South Wales the best possible service delivery whilst maintaining the highest standards of occupational health and safety. This stated priority, along with the overall commitment of the Fire Brigades to emergency risk management issues, was documented in the Corporate Plan 2005-2008.

18 The Deputy Commissioner also described the role and responsibilities of the Safety Officer, stating that:

> As part of the commitment to occupational heath and safety issues up to and including 1999, and specifically in relation to operational firefighting, an incident controller was required to appoint a safety officer for the specific purpose of minimising the risks of accidents and injuries to both operational firefighters and the community generally at such incidents by monitoring and enforcing safe working practices. The appointment of a safety officer by the incident controller was mandatory at all incidents that required the response of four (4) or more appliances as well as at large and/or complex sites and operations…
>
> With effect from April 2004 the role of a safety officer as a member of the Incident Management Team ("IMT") was completely reviewed and then further reviewed and updated in November 2005, with the particulars of when to appoint,

> qualifications for, and responsibility of, a safety officer being set out in an Incident Control System SOG (No.1.6)…
> It is now incumbent on the incident controller to appoint a safety officer at every incident involving:

· Second Alarm calls or greater;
· Complex or protracted operations;
· Large (in area) sites;
· Bushfires where and IMT is established; and
· Other appropriate incidents as determined by the incident controller.

> Indeed for large and complex incidents more than one (1) safety officer may be appointed to that incident. Where this is the case one safety officer is appointed at a strategic level, with this safety officer advising the incident controller/IMT directly. Additional tactical-level safety officers are deployed at an incident to address incident-ground issues. By way of example, it may not be possible to see all areas from one point. Tactical safety officers are to be stationed to ensure all areas of activity are under review. The higher level safety officer becomes the overall coordinator and manages the communications and actions of the tactical safety officers. Importantly, a designated safety officer to an incident has delegated authority to stop or change any order, action or condition where, in the opinion of the safety officer, the lives and safety of emergency services personnel are at risk. Such circumstances are to be contrasted with issues concerning operational or fire fighting tactics which remain the responsibility of the incident controller… it is the duty of the safety officer to act immediately where there is a perceived imminent threat to the safety of emergency services personnel present at an incident…
> ...
> It is now the case, as in 1999, that there is specific and stated autonomy of action for the appointed safety officer, so as to carry out their duties, once appointed. However the language of the 1999 SOG allowed the safety officer to intervene if time did not permit consultations with the incident controller. Now the safety officer must intervene, then consult with the incident controller. This change in emphasis reflects the continued recognition by NSWFB that safety is paramount. Indeed it is made clear… that if any actions are taken by the safety officer, and which impact upon strategy and tactics, Commanders at the incident scene must be informed and the action plan reviewed by the IMT.

19 The Deputy Commissioner advised that the defendant had implemented a range of strategies to address identified gaps in the organisation's safety management systems, and to improve occupational health and safety governance and accountability through

the operational restructure. As a result of the findings of an external audit undertaken in October 2006 the defendant established a senior Organisational Risk Management Committee to review all components of its existing safety management system, target high risk safety areas and oversee improvement projects. The defendant also established a new high level governance structure, the Occupational Health and Safety Steering Committee, chaired by Commissioner Mullins and has provided training and workshops for senior management on occupational health and safety legislation and compliance obligations. Further, the defendant reviewed and strengthened its incident reporting and investigation system and senior management accountability by directly referring all serious incidents to the Occupational Health and Safety Steering Committee for oversight by senior management, including the Commissioner.

20 It was further advised there has now been established an emergency services Occupational Health and Safety and Information Management Network that provides a forum to persons and corporations across the State. As well, since 2003, there has been distributed to all operational firefighters (both permanent and retained) a number of safety bulletins and operational bulletins that particularise information concerning safety issues. In addition, Mr Benson said the Fire Brigades has placed a high priority on the establishment of a new State Training College in order to enhance continued compliance by NSWFB firefighters with occupational health and safety requirements and to facilitate, in appropriate cases, return-to-work procedures, and generally, to improve work safety practices.

21 On the matter of training, Mr Benson indicated that induction and promotional training of NSWFB permanent and retained firefighters since 1999 has incorporated modules and assessments that emphasise occupational health and safety issues. In addition, the outgoing and mandatory in-station training includes topics that are intended to highlight occupational health and safety responsibilities. A summary was provided of the training regime for both permanent and retained firefighters at various levels within the NSWFB referring to the enhanced training focus with respect to occupational health and safety guidelines. The Deputy Commissioner said that the updated training regime has provided firefighters with a clearly defined understanding of their legislative requirements in relation to occupational health and safety in New South Wales.

22 The Court was advised that as part of the defendant's commitment to promoting safety awareness for all firefighters in operational settings, there was published in May 2005 and subsequently circulated, a document entitled “Dynamic Risk Assessment for Operations: The Safe Person Concept”. The publication notes that its overall purpose is to introduce the “Safe Person Concept” to all NSWFB personnel with a view to reducing risks faced by operational firefighters and generally improving firefighting safety. The material contained within the publication outlines the occupational health and safety responsibilities of both firefighters and, more generally, NSWFB, as a corporate entity. Specifically the publication documents the components of dynamic risk assessment process as it applies to operational incidents and describes “*the safe person approach*”.

23 The “Dynamic Risk Assessment for Operations” publication, documented the

individual responsibility of each operational firefighter to:

· Identify and manage risks to employees, the community and the organisation;

· Be aware of and follow all appropriate policies, procedures, guidelines and legislation;

· Raise any potential hazards with management;

· Take corrective action; and

· Raise any potential opportunities for improvement.

24 In relation to the Rutherford incident and the actions taken by the defendant after that incident, Mr Benson said the NSWFB undertook an incident analysis involving an immediate review of procedures and, as a consequence, in or about August 2001 SOGs for fighting fires in conventional and non-conventional silos were issued. In addition, training for both retained and permanent firefighters with respect to handling fires in silos was also introduced. Together with these SOGs, a guideline support document was also published to provide general background information and this was made available to all firefighters via the NSWFB intranet.

25 Following the handing down of the findings and recommendations by the Senior Deputy State Coroner in February 2003, the defendant designated specific senior officers to undertake and supervise the implementation of the recommendations as well as to prepare a report with specific reference to the monitoring of the implementation of the ten recommendations referrable to NSWFB.

26 On 23 December 2003 the Acting Commissioner and Director of State Operations wrote to the Senior Deputy State Coroner and provided an update of the NSWFB actions, outcomes achieved and commitments made by NSWFB in accommodating the Coroner's recommendations. These documents were provided to the Court.

27 Mr Benson described two silo fire incidents that occurred at Cootamundra in January 2007 and Temora in April 2007, and the defendant's safe conduct in handling those incidents. The Deputy Commissioner stated:

> The results achieved in the NSWFB responses in both the Cootamundra and Temora incidents demonstrate that NSWFB's commitment to improvements to operational methods of work and safety systems have been effective. Such changes and improvements for an organisation the size of NSWFB required significant financial commitment to systems of work relating to:
>
> a. Incident Command Systems;
>
> b. Incident Response and Notification Systems;
>
> c. Equipment Management Systems;

d. Incident Crew Management Systems; and

e. Training programs for Incident Controllers.

28 Mr Benson expressed regret for the shortcomings in occupational health and safety that had been identified and the impact of the deaths of Messrs Brooker, Terry and Anderson and the effects of the injuries suffered by Retained Captain Jenkins.

Approach to sentencing

29 The defendant has been charged with two offences. In my consideration as to sentence I have not dealt with the offences individually because, in my opinion, whilst the offences are breaches of two different provisions of the 1983 Act, for the purpose of sentencing the same considerations apply equally.

30 Counsel for both the prosecutor and the defendant made submissions regarding the proper approach to sentencing. There was no disagreement about this. As the prosecutor submitted, the correct approach is that discussed in *Markarian v R* (2005) 215 ALR 213, which requires the Court to adopt "the instinctive synthesis" approach to sentencing. Further, that in applying this approach the Court is to be guided by the provisions of the *Crimes (Sentencing Procedure) Act* 1999 (see *Morrison v Powercoal Pty Ltd* (No 3) (2005) 147 IR 117) and in particular:

· Section 3A with respect to the "purposes of sentencing".

· Section 21A regarding the "aggravating, mitigating and other factors in sentencing".

· Section 22, which provides that a guilty plea is to be taken into account on sentence, including when the plea was effectively indicated or entered.

31 The prosecutor referred to the judgment of *Hungerford* J in *WorkCover Authority of New South Wales (Inspector Martin) v Byrne Civil Engineering Constructions Pty Limited* (No 2) (2001) 109 IR 347 as representing the proper approach to sentencing for offences under the 1983 Act. After referring to *WorkCover Authority of New South Wales (Inspector Page) v Walco Hoist Rentals Pty Limited and Another (No 2)* (2000) 99 IR 163 at [21]-[27], *WorkCover Authority of New South Wales (Inspector Benbow) v Converquip Pty Limited* (2001) 106 IR 258 at [42] and *Manpac Industries Pty Ltd (formerly t/a Pacific Concrete & Quarries Pty Ltd) v WorkCover Authority of New South Wales (Inspector Glass)* (2001) 106 IR 435 at [82], his Honour stated at [19]:

> In summary, then, the proper approach in sentencing an offender is to consider the objective seriousness of the offence charged in terms of its nature and quality so as to compel attention to occupational health and safety risks but not so as to be oppressively high; matters subjective to the defendant, such as previous good industrial citizenship and the absence of prior convictions, whilst relevant rank in importance well behind the primary aspect of the nature and quality of the offence. Overall, a penalty is to be imposed so as to give effect to the clear

> policy of the *Occupational Health and Safety Act*, namely, the establishment of safe standards and the protection of the workforce.

32 I respectfully agree with his Honour and consider the same approach is to be adopted under the 2000 Act. Further, as the prosecutor also submitted, neither the principles discussed in *Markarian* nor the provisions of the *Crimes (Sentencing Procedure) Act* require a departure from the general jurisprudence of this Court with respect to sentencing offenders for breaches of the *Occupational Health and Safety Act*. As it was stated in *R v Way* (2004) 60 NSWLR 168 at [56]:

> [I]t is not to be overlooked that there is a well established body of principles that have been developed by the courts over a long period of time. By providing guidance in the form of a list of aggravating and mitigating factors in s 21A, the Parliament did not intend to overrule or disturb those principles or restrict their application. In so far as those principles refer to factors, whether objective or subjective, that affect the 'relative seriousness' of the offence, they are expressly preserved by s 21A (1) (c).

33 The prosecutor also observed, and it is an observation with which I agree, that there is no standard discount figure that is to be applied with respect to subjective factors and that *R v Thompson; R v Houlton* (2000) 49 NSWLR 383 does not require otherwise. The subjective factors in each case must be weighed in the particular context and circumstance of each case, individually.

34 Both Mr *Crawshaw* SC for the prosecutor and Mr *Kite* SC for the defendant relied on the approach in two decisions (*Inspector Legge v Intercast & Forge Pty Limited* [2006] NSWIRComm 182 and *Inspector Jennifer Short v The Crown in the Right of the State of New South Wales (NSW Police)* [2007] NSWIRComm 138) where I had identified those 'core matters' to which the Court should have regard in sentencing proceedings in this jurisdiction. In the former decision I stated at [26]:

> 26 The core matters are as follows:
>
> (1) The maximum penalty for the offence: Careful attention should be given to the maximum penalties because, firstly, the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick: See *Markarian v R* (2005) 215 ALR 213 at [31].
>
> (2) An analysis of the offending conduct with a view to determining the nature and quality of the offence: *See Lawrenson Diecasting Pty Limited v WorkCover Authority of New South*

Wales (Inspector Ch'ng) (1999) 90 IR 464 at 475. This would involve an assessment of the seriousness of the breach. Although the damage or injury caused by the breach does not, of itself, dictate the seriousness of the offence or the penalty, a breach where there was every prospect of serious consequences may be assessed on a different basis to a breach unlikely to have such consequences. In such a case, the occurrence of death or serious injury may manifest the degree of seriousness of the relevant risk: See *Maddaford v CSR Limited and Mulgoa Quarries Pty Ltd* [2004] NSWIRComm 337 at [17] - [18]. See also *Capral Aluminium Ltd v WorkCover Authority of New South Wales* (2000) 49 NSWLR 610 at [94] and [95]; *WorkCover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Limited and Anor* (2000) 95 IR 383 at 428; and *Morrison v Powercoal Pty Ltd* (2003) 130 IR 364 at [32].

(3) An identification of the risk and the degree of foreseeability of the risk. This is a significant factor to be taken into account when assessing the level of culpability of the defendant: See *Capral Aluminium Limited* at [81], confirming the approach taken by *Walton* J, Vice President, in *Department of Mineral Resources of New South Wales (McKensey) v Kembla Coal and Coke Pty Limited* (1999) 92 IR 8 at 27.

(4) Whether there were simple and straightforward remedial steps that were available, which could have avoided the accident. The existence of simple and straightforward remedial steps which could have been taken by the defendant to avoid the risk to safety are relevant to assessing the seriousness of the offence: See *Department of Mineral Resources of NSW (McKensey) v Kembla Coal & Coke Pty Limited* (1999) 92 IR 8 at 27; *WorkCover Authority of NSW (Inspector Glass) v ACI Operations Pty Limited* [1994] NSWIRComm 11; *Inspector Elizabeth Benbow v Planada Holdings Pty Limited* [2001] NSWIRComm 275.

(5) The need for general and specific deterrence: See *Capral Aluminium* at [71] to [80].

(6) Subjective considerations including such matters as a plea of guilty entered by the defendant, remorse, contrition, whether there are prior offences, cooperation with the investigating authority, measures taken by the defendant to prevent a re-occurrence of the breach, and assistance provided to any worker injured as a consequence of the breach: See *Lawrenson Diecasting* at 475.

Maximum penalty

35 The defendant, being the Crown in the Right of the State of New South Wales, has prior convictions. However the agency of the Crown involved in this case, namely the NSW Fire Brigades, has no prior convictions. It becomes necessary to consider the effect of s 121 of the *Occupational Health and Safety Act* 2000. It should be noted the 2000 Act commenced on 1 September 2001 and, by cl 13 of Sch 3 - Savings, transitional and other provisions thereof, Pt 7 - Criminal and other proceedings (which includes s 121) extends to proceedings, such as the present, under the 1983 Act. Section 121 provides:

121 Penalties in respect of proceedings against the Crown

(1) In this section, *penalty* means:

(a) the monetary penalty for an offence against this Act or the regulations, or

(b) the amount payable under a penalty notice served in connection with such an offence, or

(c) the amount payable under an order made under Division 2.

(2) The penalty in respect of proceedings against the Crown is the penalty applicable in respect of offences committed by a corporation.

(3) If that penalty differs for previous offenders, the Crown is a previous offender in relation to particular proceedings against the Crown only if the Crown is a previous offender in respect of the acts or omissions of the same responsible agency of the Crown (or any predecessor of that agency).

(4) Enforcement proceedings under the *Fines Act* 1996 cannot be taken in connection with penalties imposed in respect of proceedings against the Crown.

36 The interpretation that has been applied to s 121(3) is that it is not applicable "to the Court's consideration of prior convictions of the Crown for the purpose of determining the appropriate sentence in relation to a charge as distinct from the determination of the maximum penalty for that offence" : see *WorkCover Authority of New South Wales (Inspector Ankucic) v Crown in the Right of the State of New South Wales (Department of Education and Training)* (2001) 112 IR 1 at [66] per *Walton* J, Vice President. See also *WorkCover Authority of New South Wales (Inspector Keelty) v Crown in Right of the State of New South Wales (Police Service of New South*

Wales) (No 3) (2002) 112 IR 141 at [15]-[17] per *Hungerford* J. In other words, s 121(3) is concerned only with fixing the maximum penalty; it does not otherwise address the determination of a penalty for a particular offence within the permissible range from zero to the relevant maximum amount: *Police Service (No 3)* at [16].
37 It follows that the maximum penalty applicable in respect of each of the subject offences is $550,000. The penalty to be imposed is to be assessed having regard to all of the circumstances of the case against the continuum from 0 to 100 per cent of the maximum, with the maximum available to be applied in a "worst case".

The offending conduct

38 The serious nature of the extensive failures enumerated in the charges provides some insight into the gravity of the offences. Those failures included a failure to provide or maintain a system of work that was safe and without risks; a failure to provide and/ or maintain a safe work method for use in the fighting of and/or extinguishing a suspected fire in a seed meal storage bin; a failure to provide its employees with any adequate information about the fire and/ or explosion risks inherent in the processes conducted in and about seed oil extraction plants; a failure to provide the necessary supervision; a failure to maintain strict control of the site and to control the access of non-New South Wales personnel to areas that were liable to be and were affected by explosion and fire emanating from bin D; and, a failure to ensure that non-New South Wales Fire Brigades personnel were fitted with proper personal protective equipment prior to being permitted access to areas of the site in which they were exposed to risks of injury from the fire located inside bin D.

39 At [116] of the decision in *WorkCover v Fire Brigades* the Court quoted with approval from a submission put by the prosecutor as follows:

> [I]t is the very nature of the defendant's duties under the *Fire Brigade Act* that means that the fire brigade has to be prepared for all manner of risks for the health and safety of its employees that might arise in the course of its employees' performing fire prevention and fire suppression duties or, for that matter, Hazmat response, pursuant to section 11 of the *Fire Brigade Act*.

40 Despite the nature of its duties, the defendant was grossly under-prepared for dealing with a situation involving material spontaneously combusting in a silo and the consequent risks that situation produced to the health and safety of employees and non-employees. As the Court found at [116]:

> Whilst the defendant was completely aware of the risks associated with the seed oil extraction process, including the risks of spontaneous combustion and dust explosions associated with seed storage, seedcake and seed meal and whilst there were some indications that the defendant had taken steps to plan in relation to the prevention and/or the fighting of fires in seed oil extraction plants, those steps fell well short of providing a system that was safe and without risk.

And at [126]-[127]:

> The defendant was aware of the potential for ignition of gases caused by an inrush of air and of the importance of ensuring against the risk of an explosion that might be caused by an inrush or air when unloading bin D. However, extraordinarily, SO Evans said he was not aware of the hazard associated with introducing oxygen into the headspace of a silo with spontaneously combusted material inside.
> …the defendant cannot claim it provided a system of work that ensured safety when one of its officers in such a key firefighting role simply had not been provided with the necessary training and knowledge to deal with the situation.

And at [135]:

> Whilst, as I have noted, there were elements of a relevant system of work within the defendant's operations, including some policies, procedures and information, there was no coherent system that was capable of being effectively deployed on the ground in the type of emergency that arose at Caines' plant on 6 December. However, even if the elements to which I have referred could be said to constitute a "system" it was, manifestly, not a system of work that was safe and without risks to employees and non-employees.

41 The Court also made the following relevant findings:

· the steps the defendant had put in place for dealing with fires in seed oil extraction plants were *ad hoc* and in so far as ensuring safety was concerned, ineffective ([117]);
· the defendant had failed to adequately turn its corporate mind to putting in place a safe system with respect to the prevention and/or the fighting of fires in seed oil extraction plants, including but not limited to the prevention and/or fighting of fires in seed meal storage facilities such as the seed meal storage bin, known as bin D ([117]);
· there was no operational guideline in place dealing with the fighting of fires in oil seed processing plants and which informed and guided employees as to the matters that needed to be considered as part of a risk assessment ([119]);
· there was no system requirement to conduct a comprehensive risk assessment and nothing in the form of an adequate checklist to address the peculiar features of a fire in an oilseed processing plant ([122]); and
· the defendant failed to provide and/or maintain a safe work method for the conduct of monitoring for flammable gases as charged ([168]) and such gas testing as was performed was perfunctory despite the presence of numerous indicators consistent with the presence of a real and significant risk of the presence of combustible gases ([163]-[164]).

42 As it was earlier noted, the occurrence of death or serious injury may manifest the degree of seriousness of the relevant risk. At [150] the Court found that the size of the fireball, the physical damage sustained to the plant and the injuries sustained by Captain Jenkins and the deceased, were evidence of the magnitude and gravity of the

risk to which the defendant's employees were exposed. The same finding applies in relation to the Caines' employees.

43 In identifying what it regarded as mitigating factors the defendant submitted that there were "many factors that seriously hampered the level, and quality, of the response by NSWFB when its employees attended the Caines site at Rutherford on the morning of 6th December 1999". Specifically, it was submitted that Caines owned and occupied the relevant site and that it failed, comprehensively, to ensure the safety of its own employees and employees of NSWFB. The defendant referred to the Court's decision in *Inspector Mayo-Ramsay v Caines Pty Limited & Ors* where it was found, when assessing the seriousness of the offences proved against Caines, that:

> a) The design and construction of the plant at Rutherford and in particular the silo known as Bin D failed to take adequate account of the fire explosion risk inherent in the processes conducted in and about that plant;
> b) That the Defendant Caines knew that cottonseed meal would spontaneously combust at high temperatures and give off pyrolytic or volatile fumes and pyrolytic gases;
> c) Importantly that the Defendant Caines was on specific notice of the risks and “shortcomings” and the steps that it had to take to deal with those risks and the course of the construction and subsequent operation of the expeller plant, such notice being given by its insurer Zurich Financial Services Australia Pty Limited prior to the fire and explosion in meal Bin D on the morning of 6th December 1999. This report contained specific observations and recommendations with respect to hazard control/risk management at the subject site; and
> d) Despite such specific observations being made in each of the loss control reports prepared by Zurich the response by Caines was found by your Honour to be completely inadequate in addressing such identified risk and implementing the recommendations made to them by the authors of the Zurich report. In particular that Caines did not inform any of the employee representatives of the Occupational Health and Safety Committee at Caines of the existence of the Zurich reports and the recommendations thereto.

44 It was further submitted by counsel that although there was not a coherent system such that the defendant’s employees were not capable of being effectively deployed at the incident at the Caines' plant on 6 December 1999, it was found in *WorkCover v Fire Brigades* that there was evidence of a relevant system of work within the defendant’s operations as at 6 December 1999. Consequently, this was not a case where there were no policies or procedures in place or where the defendant had no regard for the safety of its employees or others; it was the case that the policies and procedures then in place were not adequate.

45 In relation to the state of the Caines' plant and Caines' role in contributing to the tragedy that occurred on 6 December 1999, the defendant had submitted in the earlier

proceedings that it could not be criticised, let alone prosecuted, for the charge that it failed to provide a safe work method in fighting and/or extinguishing a suspected fire in a seed meal storage bin in circumstances of such a disorganised and dysfunctional plant that ignored occupational health and safety requirements and responsibilities even when directed to do so by its insurer. The Court responded to that submission by stating at [156]:

> (1) That an employer may operate a disorganised and dysfunctional plant from an occupational health and safety viewpoint could not, by itself, be regarded as the basis for relieving the defendant from providing a safe work method for use in the fighting of and/or extinguishing a suspected fire.
> (2) The poor state of the plant, the absence of any emergency plan and the absence of training of Caines' personnel should have served to highlight the need for an adequate risk assessment before embarking on a course of action to deal with the contents of bin D.
>
> (3) The use of the auger to empty bin D may have proceeded without incident but that seemed to be more luck than good safety management. In any event, the important consideration in so far as the auger is concerned is the risks created by its use and these included those risks described earlier in relation to the failure to provide a safe system of work.
>
> (4) The evidence establishes the defendant did not provide and maintain a relevant safe system of work.

46 Those observations remain apposite. The fact that Caines contributed to the creation of a risk to health and safety, to whatever degree, does not absolve the Fire Brigades of its obligations. As the Full Bench said in *The Crown in Right of State of New South Wales (Department of Education and Training) v O'Sullivan* (2005) 143 IR 57 at [42]:

> The fact that a risk was not created by, or under the control of, a defendant is not to the point. Many prosecutions under the Occupational Health and Safety Act involve risks not created by the defendant. The defendant's obligation under s 15(1) of the Act is to ensure the safety of employees. That may be done by eliminating, or preventing or minimising exposure to, any risk however it may have come about or, given the defence of reasonable practicability, by taking all reasonably practicable steps to ensure employees are not exposed to the risk.

47 Nevertheless, in the context of sentencing, I am prepared to accept, in mitigation, that the state of the plant and the failures by Caines and its directors in relation to occupational health and safety made the risk worse than it otherwise might have been. I also accept that the defendant did have in place elements of a relevant system of work within its operations, including some policies, procedures and information for

dealing with silo fires and that this is not a case where no system existed or where the defendant had no regard for the safety of personnel.
48 I acknowledge that ensuring the Fire Brigades had a system in which each and every firefighter and officer was informed, trained and competent to deal with such fires, which occurred only rarely, would have constituted an administrative and logistical challenge for the organisation. Then again, as I commented earlier, it is the very nature of the defendant's duties under the *Fire Brigades Act* that means that the Fire Brigades has to be prepared for all manner of risks. Given the absolute nature of the duty under ss 15 and 16 of the Act to ensure safety and the Fire Brigades' obligations under its statute, it would not be appropriate to provide any concession for the fact that there may have been logistical difficulties associated with having in place a system that ensured all members were trained and ready to deal with any fire situation that may confront them.

The risk and the degree of foreseeability of the risk

49 The risk was the danger to health and safety of the identified employees of the defendant and of Caines, by reason of explosion or fire escaping from bin D. In *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 464 it was held that it will be a serious offence where there is an obvious or foreseeable risk to safety against which appropriate measures were not taken, even though such measures were available and feasible. See also *Fletcher Construction Australia Limited v WorkCover Authority of New South Wales (Inspector Fisher)* (1999) 91 IR 66 at 70.

50 The defendant contended that silo fires were relatively uncommon and referred to evidence to support that proposition. The defendant accepted, however, that notwithstanding the infrequency of responses to silo fires and the absence of previous explosions resulting from silo incidents, the risk was foreseeable. Nevertheless, it was submitted that the relative infrequency of such events and the factors afflicting the particular site, in particular the failure of Caines to have in place any systems, documents or plans designed to supply members of the NSW Fire Brigades with adequate information about the properties of cottonseed meal, spent bleaching earth and other products stored on its site, including their capacity to spontaneously combust, smoulder and give off pyrolytic vapours and gases when subjected to heat, should lead the Court to the conclusion that the degree of foreseeability was not high.
51 I am unable to accept this submission. One of the findings of fact in *WorkCover v Fire Brigades,* to which I have already referred, was that the defendant was "completely aware" of the risks associated with seed oil extraction process, including the risk of spontaneous combustion and dust explosions associated with seed storage, seedcake and seed meal: [116]. So the defendant knew the risk but it would appear this knowledge had not been imparted to Station Officer Evans, the incident controller at the time, or if it had been it had not been done effectively such that it caused Station Officer Evans to take appropriate action.

Remedial steps

52 The existence of simple and straightforward remedial steps, which could have

been taken by the defendant to avoid the risk to safety, are relevant to assessing the seriousness of the offence. The use of the terms "simple" and "straightforward" may be somewhat misleading. It seems to me that if there are steps that could have been taken to avoid the risk, they are relevant to be taken into account regardless of whether they are simple and straightforward or hard and complicated. Of course, the simpler and more readily available the steps might be, if they were not employed to avoid the risk, the greater the likelihood is that a harsher assessment would be made as to the seriousness of the offence.

53 Deputy Commissioner Benson in his affidavit provided details of the steps taken by the defendant following the incident on 6 December 1999 to avoid it occurring again. At the general level these measures involved a much greater focus and priority on occupational health and safety than hitherto had been the case, including the implementation of a range of strategies to address identified gaps in the organisation's safety management systems and to improve occupational health and safety governance and accountability through the operational restructure, an updated training regime, which has provided firefighters with a clearly defined understanding of their legislative requirements in relation to occupational health and safety and improved methods of communication with firefighters.

54 More specifically, following the fire and explosion at the Caines Rutherford site, the Fire Brigades undertook an incident analysis involving a review of procedures and, as a consequence, in or about August 2001 Standard Operational Guidelines ('SOGs') for fighting fires in conventional and non-conventional silos were issued. In addition, training for both retained and permanent firefighters with respect to handling fires in silos was also introduced. Together with these SOGs, a guideline support document was also published to provide general background information and this was made available to all firefighters via the Fire Brigades' intranet. Additionally, the Brigades has upgraded the role and responsibilities of safety officer as members of Incident Management Teams. An incident controller is required to appoint a safety officer for the specific purpose of minimising the risks of accidents and injuries to both operational firefighters and the community generally by monitoring and enforcing safe working practices.

55 The steps taken by the defendant following the Caines' tragedy involved a comprehensive mix of measures, some relatively simple and straightforward and others requiring the input of quite considerable time and resources. In my opinion, however, all of the remedial measures taken by the Fire Brigades were reasonably practicable and given the defendant was aware of the risks presented by silo fires, the measures could have - and should have - been taken before 6 December 1999. I have taken this into account in assessing penalty.

Deterrence

56 The prosecutor submitted that the defendant remained an employer and continued to be involved in fire prevention and fire suppression both in the general community and in industrial settings. The available evidence also indicated that the defendant continued to rely upon non-employees in the suppression of fires in industrial complexes and situations. In the circumstances, it was submitted that the penalty to be imposed should reflect both elements of general and specific deterrence: see

Inspector Dennis Howard v Multiplex Constructions (NSW) Pty Ltd [2002] NSWIRComm 229 at [26] and *Inspector Steven Jones v Walker Group Constructions Pty Ltd* [2006] NSWIRComm 11 at [25]–[26].

57 Mr *Kite,* for the defendant, submitted that whilst it accepted that the nature of and basis for occupational health and safety legislation will generally mandate the inclusion of an element for specific deterrence, in the circumstances of this case it was submitted that the specific deterrent element ought to be minimal if not zero. That was because of:

> (i) the absence of any convictions or proceedings against the NSWFB since its formation in 1884 for breaches of occupational health and safety legislation or its equivalent;
>
> (ii) the immediate response of the NSWFB in developing and introducing practices and procedures specifically directed to overcoming the shortcomings revealed by this incident;
>
> (iii) the Defendant's demonstrated long-standing, thorough and ongoing commitment to occupational health and safety issues and responsibilities.

58 Mr *Kite* said the defendant accepted that there would be a necessary element of general deterrence included in the penalty. However, for this purpose the observation was made that the Fire Brigades was but one of only a very limited number of entities in this State that was engaged in essential firefighting activity.

59 I note counsel's acceptance that there should be an element of general deterrence included in the penalty and I propose to do that. In so far as specific deterrence is concerned, the matters put forward by senior counsel for the defendant as to why the specific deterrent element ought be minimal if not zero are entirely relevant and appropriate to be taken into account by the Court in fixing penalty. There is no escaping the fact that for a large organisation engaged in one of the State's more hazardous activities it has an excellent record in that there are no recorded breaches of the occupational health and safety legislation. Moreover, it has taken timely, comprehensive and appropriate measures to avoid a repeat of what occurred on 6 December 1999. In this latter respect, I note Deputy Commissioner Benson's evidence concerning the defendant's conduct at two silo incidents at Cootamundra and Temora in January and April 2007. One would have to conclude those emergencies were handled with a high degree of professionalism and minimal risk to firefighters and the local community.

60 In the circumstances, it is open to the Court to conclude, and I do so, that the chances of the defendant re-offending are slight. However, as the Full Bench in *Capral Aluminium Limited v WorkCover Authority of New South Wales (Inspector Mayo-Ramsay)* (2000) 99 IR 29 observed at [77]:

> In sentencing, a Court may disregard the element of specific deterrence if satisfied that the risk of re-offending is low or non-existent. The Court may form such a view as a result of the rehabilitation of the offender … or because the offender will not have the opportunity to commit a similar offence in the

> future… However, we think it unlikely that the weight to be attached to specific deterrence could be reduced to zero in the case of offences under the Act. At least where the offender continues to be an employer, risk to safety or its employees or contractors may exist or be possible. Breaches of the duties imposed by the Act may incur both by omission and omission. Employers are required to maintain constant diligence and take all practical precautions to ensure safety in the work place.

Subjective considerations

Plea

61 The defendant submitted that whilst there was no "guilty" plea the approach by the defendant to the proceedings was to admit the elements of the charges (although it did not admit to all of the particulars thereof). The primary submissions made by the defendant in *WorkCover v Fire Brigades* concerned the applicability of the statutory immunity provision contained within s 78 of the *Fire Brigades Act* to the defendant. It was submitted there was an undoubted public interest in determining the scope of s 78. Further, it was submitted, the defendant agreed to the tender of, *inter alia*, the transcript of evidence given and other documentary evidence. Accordingly, Mr *Kite* contended, much Court time was saved. Counsel submitted the defendant's approach had significant utilitarian value and it should be entitled to the full or at least a substantial discount.

62 Whilst acknowledging the defendant's not guilty pleas were entered within the context of testing whether the defendant was entitled to statutory immunity and that the defendant made a large number of factual concessions and admissions, Mr *Crawshaw*, for the prosecutor, submitted regard should be had to the approach and submissions otherwise maintained by the defendant in the course of the subject proceedings.

63 In this respect, it was submitted the defendant had maintained a position throughout the primary hearing that involved only a limited acknowledgement of the failures that occurred and the nature and the extent of the risk associated with the activities of the defendant's employees on the morning of the subject incident. Thus the defendant maintained throughout the primary hearing that:

· Some of the more serious particulars of the offences were not made out. However, most of these particulars were found to be made out in the primary judgment;
· Those persons who were at risk were limited in scope to Captain Jenkins, Deputy Captain Morriss, RF Armstrong, Mr Jordan and the deceased. However, numerous other persons were found to be at risk in the primary judgment.

64 In the circumstances, it was submitted that the defendant had sought not only the protection of s 78 of the *Fire Brigades Act*, but had also maintained a position that went beyond the argument that "but for" s 78, it would have entered pleas of "guilty" to the charges.

65 Nonetheless, the prosecutor conceded that the admissions made on behalf of the

defendant with respect to the charges, together with the admissions of fact and the approach adopted by the defendant to the admission of evidence in documentary form, had "undoubtedly resulted in significant savings of court time and resources by comparison to a full defended hearing on the facts."

66 In the circumstances, it was conceded by the prosecutor that there was a significant “utilitarian value” to the Court and to the State, in terms of resources that had flowed from the approach adopted by the defendant to the conduct of its defence. It was said that this was similar to the utility that flows from “a plea of guilty” and it was conceded that the utility of the defendant’s approach should be reflected in some discount in the sentence to be imposed.

67 However, Mr *Crawshaw* submitted that as in the case of the discount that flows from an early plea, any such discount or allowance that the Court might extend to the defendant in the course of exercising its sentencing discretion should reflect solely the benefits to the administration of justice and should be not granted on the basis of any mitigation of culpability: see *Regina v Dib* [2003] NSWCCA 117 at [3]–[8].

68 I accept the thrust of the prosecutor's submission regarding the pleas. Whilst I do not accept that the discount should be to the fullest extent that is available under the guideline judgment of *R v Thompson; R v Houlton*, as the prosecutor submitted, there was a significant “utilitarian value” to the Court and to the State, in terms of resources that had flowed from the approach adopted by the defendant to the conduct of its defence. I, therefore, propose to apply a discount of 15 per cent.

Remorse and contrition

69 The prosecutor acknowledged that there was an expression by Deputy Commissioner Benson of remorse and contrition by the defendant with respect to both the shortcomings identified by this Court, and with respect to the deaths and the injuries that flowed therefrom. However, it was submitted it was important to place the expression of contrition and remorse with respect to the offences within the context of the approach that had been adopted by the defendant to its breaches of the Act, namely, that the defendant had maintained a position throughout the primary hearing that involved only a limited acknowledgement of the failures that occurred and of the nature and the extent of the risk associated with the activities of the defendant’s employees on the morning of the subject incident. Again, I accept the prosecutor's submission; that is there was a genuine expression of remorse but that has to be seen in the context of the defendant's resistance to the charges.

Remedial steps

70 The defendant is entitled to rely on the remedial steps taken after the incident to meet its occupational health and safety obligations. I have already referred to these steps and noted they were timely, comprehensive and appropriate.

Prior offences

71 The defendant has prior convictions recorded against it but its agency, the Fire Brigades, has not. Further to the earlier discussion, application of s 121 of the 2000 Act to offences committed under the 1983 Act does not preclude such convictions being taken into account in the context of sentencing. I note, however, the observation of *Hungerford* J in *WorkCover Authority of New South Wales (Inspector Tuckley) v*

The Crown in Right of the State of New South Wales (Department of Community Services) (1999) 96 IR 1 at 22 that whilst prior convictions of the Crown generally are relevant, "a most relevant consideration would be if no prior convictions existed in relation to the department concerned". That the Fire Brigades has no prior convictions is most relevant, in my opinion, and points to the need for a degree of leniency in this case. I do not regard the subject offences as manifesting a continuing attitude of disobedience of the law by the defendant.

Parity

72 The defendant raised the application of the principle of parity and submitted the level of culpability of the defendants in *Inspector Mayo-Ramsay v Caines Pty Limited & Ors* (in particular Caines) must be weighed as significantly higher to that of the Fire Brigades.

73 It does not seem to me that, strictly speaking, the principle of parity applies here because it does not involve co-offenders in a single offence. Nonetheless, the need for consistency in the sentencing of offenders for what may be described as “related offences” has been recognised in this jurisdiction: see *Warman International Limited v WorkCover Authority of New South Wales* (1998) 80 IR 326. However, I agree with the prosecutor that the differences in the circumstances of the defendant in the present proceedings and those prevailing in respect of the defendants in *Inspector Mayo-Ramsay v Caines Pty Limited & Ors*, are such that no meaningful comparison can be made in the context of consistency of sentencing because it would not be comparing like with like. As it was pointed out by the prosecutor:

· No plea was entered on behalf of Caines Pty Ltd (In Liquidation) and the company was dealt with ex parte;
· The company was not previously recorded;
· Mr Hislop and Mr Heagney were prosecuted in their various capacities within the management hierarchy of the company, by virtue of s 50(1) of the OHS Act 1983 and faced maximum penalties of $55,000.00 with respect to each of two charges; and
· Mr Hislop and Mr Heagney both pleaded guilty and neither defendant was previously recorded.

Totality

74 As the majority observed in *Newcastle Wallsend Coal Company Pty Ltd v WorkCover Authority (NSW) (Inspector McMartin)* (2006) 159 IR 121 at [584], the correct approach to sentencing in circumstances where the totality principle arises for consideration involves taking each of the offences and, having regard to all of the relevant circumstances including the objective and subjective factors, arriving at a separate penalty for each offence. It is then open to the sentencing judge to apply the totality principle, which requires consideration of the overall criminality involved in the offences and which requires that regard be had to the principle that a defendant is not to be punished more than once for elements which are common to the offences as well as ensuring the aggregate sentence or penalty is just and appropriate: *Crown in Right of the State of New South Wales (Department of Education and Training) v Keenan* (2001) 105 IR 181 at [37]. Once the totality principle had been applied it will

then usually be appropriate to fix separate penalties for each offence.
75 In my opinion, having regard to how the charges were framed, the evidence in the proceedings and the Court's findings regarding the objective and subjective factors, there is no basis for distinguishing between the gravity of the two offences; they should attract the same penalty.
76 For the offence committed against s 15(1) of the Act I consider that, in all of the circumstances, the appropriate penalty is $170,000. Given my view that the two offences should attract the same penalty, for the offence committed against s 16(1) the penalty is $170,000.
77 As I have noted, under the totality principle a defendant is not to be punished more than once for elements that are common to the offences and, as well, the aggregate sentence or penalty is to be just and appropriate having regard to the overall criminality involved. In a technical sense, s 15(1) and s 16(1) are constituted by different elements but the intention of both sections is the same, that is, to place obligations on employers to ensure the health and safety of persons where those persons are at the employer's place of work, and those obligations apply equally to employees and non-employees. It is arguable, therefore, that where two offences have been committed, one under s 15(1) and the other under s 16(1) and the offences are of the same level of seriousness so as to attract the same amount of penalty, that to do other than apply one penalty to both offences would be to breach the totality principle.
78 One the other hand, if the defendant has breached its separate obligations to both employees and non-employees, it is arguable that applying the penalty for one offence to both offences would not reflect the overall criminality involved.
79 Having regard to all of the objective and subjective factors relevant to the two offences, there can be no doubt that, notwithstanding the significant subjective considerations in favour of the defendant, the offences were most serious. In my opinion, although there is a significant overlap between the elements of the respective offences, an aggregate sentence of $170,000 would not properly reflect the overall criminality of the offences. Accordingly, I have decided the offence under s 15(1) should attract a penalty of $100,000 and the offence under s 16(1) should attract the same penalty, making a total of $200,000.

Orders

80 The Court makes the following orders:

Matter No IRC 768 of 2005

(1) A verdict of guilty is entered.

(2) The defendant is fined an amount of $100,000 with a moiety thereof to the prosecutor.

(3) The defendant shall pay the costs of the prosecutor as agreed or assessed. Failing agreement, the matter may be referred to the Registrar for assessment.

Matter No IRC 769 of 2005

(1) A verdict of guilty is entered.

(2) The defendant is fined an amount of $100,000 with a moiety thereof to the prosecutor.

(3) The defendant shall pay the costs of the prosecutor as agreed or assessed. Failing agreement, the matter may be referred to the Registrar for assessment.